

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
	:	
of	:	
	:	
ERIC S. BROWN	:	ORDER
	:	DTA NO. 818187
For Revision of a Determination or for Refund	:	
of Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Period September 1, 1998	:	
through November 30, 1999.	:	

Petitioner, Eric S. Brown, 547 West 49th Street, New York, New York 10019, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period September 1, 1998 through November 30, 1999.

On April 9, 2001, the Division of Taxation, by its representative Barbara G. Billet, Esq. (Michael P. McKinley, Esq., of counsel), brought a Motion for Summary Determination seeking dismissal of the petition in the above-referenced matter, pursuant to section 3000.5 and 3000.9(b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal, on the ground that petitioner failed to file a request for a conciliation conference with the Division of Taxation's Bureau of Conciliation and Mediation Services or a petition with the Division of Tax Appeals for an administrative hearing within 90 days after the issuance of notices of determination to petitioner. Petitioner, appearing by Michael A. Zimmerman, Esq., had until May 24, 2001 to respond to the Division's motion.¹ By a letter dated May 24, 2001, petitioner's representative advised that

¹ The Division's Motion for Summary Determination is dated April 9, 2001, but was not mailed to petitioner until April 24, 2001. Consequently, the 30 day period within which to respond to the motion did not commence to run until such April 24, 2001 date.

petitioner would not be responding to the Division's motion, and thus the 90-day period for issuance of this order commenced on May 24, 2001 pursuant to section 3000.5(d) of the Rules. After review of the motion papers, affidavits and documents submitted therewith, and all pleadings and related documents submitted in connection with this matter, Dennis M. Galliher, Administrative Law Judge, renders the following order.

ISSUE

Whether petitioner timely filed either a request for a conciliation conference or a petition with the Division of Tax Appeals contesting certain statutory notices of determination.

FINDINGS OF FACT

1. At issue in this matter are ten notices of determination issued by the Division of Taxation ("Division") against petitioner, Eric S. Brown. These notices assess sales and use taxes due as follows:

<u>Assessment ID #</u>	<u>Sales Tax Quarterly Period</u>	<u>Tax Amount</u>
L-017649104	03/01/99 - 05/31/99	\$15,494.12
L-017649105	12/01/98 - 02/28/99	14,514.36
L-017649106	09/01/98 - 11/30/98	49.02
L-017764222	09/01/99 - 11/30/99	12,137.73
L-017764223	06/01/99 - 08/31/99	8,846.87
L-017764224	03/01/99 - 05/31/99	9,938.18
L-017764225	12/01/98 - 02/28/99	11,327.13
L-017764230	09/01/99 - 11/30/99	31,405.71
L-017764231	06/01/99 - 08/31/99	21,448.68
L-017764232	03/01/99 - 05/31/99	29,786.51

The first three notices listed above are dated April 27, 2000, while the remaining seven notices are dated May 11, 2000.² Each of the notices claims that petitioner was an officer or person responsible to collect and remit sales and use taxes on behalf of certain related corporations, pursuant to Tax Law § 1138(a), § 1131(1) and § 1133(a). The dollar amounts shown above represent tax only, and are exclusive of penalty and interest amounts which were also assessed as due under each of the notices.

2. The notices described above were addressed to petitioner, Eric S. Brown, at 1965 Broadway, 16-A, New York, New York 10023-5928. This same address is listed on the Division's mailing records, described hereinafter, as the address to which the notices were mailed.

3. Petitioner protested the liabilities assessed under the foregoing notices by filing with the Division's Bureau of Conciliation and Mediation Services ("BCMS") a separate request for a conciliation conference for each notice issued. These requests are signed by petitioner's representative, Michael A. Zimmerman, and each protests, in identical language, petitioner's status as an officer or responsible person. The requests pertaining to the April 27 notices are hand-dated as signed on July 25, 2000, and the requests pertaining to the May 11 notices are hand-dated as signed on August 7, 2000. The one envelope in which all ten of the conference requests were mailed bears a machine metered (Pitney Bowes) postmark of July 25, 2000. The envelope carries a label indicating that it was sent via certified mail. However, the envelope does not carry a United States Postal Service ("USPS") postmark, nor does the record include any information regarding the certified mailing, such as a return receipt card. Each of the ten

² Hereinafter, the first three notices are sometimes referred to as the "April 27 notices," and the remaining seven notices are sometimes referred to as the "May 11 notices."

requests for conference, as well as the envelope in which they were mailed, bears an August 21, 2000 BCMS receipt stamp.

4. Since the August 21, 2000 receipt date was more than 90 days after both the April 27, 2000 and May 11, 2000 mailing dates on the face of the respective notices, petitioner's requests for a conciliation conference were denied as untimely per a BCMS conciliation order (CMS No. 182305) dated September 1, 2000.

5. Petitioner protested this denial by filing a petition with the Division of Tax Appeals. Petitioner claimed, in his petition, that he was not an officer or responsible person and, as is relevant to the issue of timeliness, alleged that "[a]ll previously filed Request For Conciliation Conferences for each of the relevant Notice/Assessments herein were timely filed and petitioner has postmark documentation to establish this fact."

6. The Division filed an answer to the petition alleging, *inter alia*, that petitioner's conference requests were not filed within 90 days after the dates of issuance of the notices, were properly denied as untimely, and that as a consequence the petition should be dismissed.

7. In support of its position that the notices were properly mailed, the Division submitted evidence describing its mailing procedures. Notices of determination, such as those at issue herein, are computer-generated by the Division's Computerized Case and Resource Tracking System ("CARTS") Control Unit. The computer preparation of such notices also includes the preparation of a computer printout entitled "Assessments Receivable, Certified Record For Non-Presort Mail," known commonly as a certified mailing record ("CMR"). The CMR lists those taxpayers to whom notices of determination are being mailed and also includes, for each such notice, a separate certified control number. This number is recorded on the CMR under the heading "Certified No." The CMR lists an initial date (the date of its printing) in its upper left

corner which is approximately 10 days earlier than the anticipated mailing date for the notices. This period is provided to allow sufficient time for manual review and processing of the individual notices, including affixation of postage, and mailing. The initial (printing) date on the CMR is manually changed at the time of mailing by Division personnel to conform to the actual date of mailing of the notices. The pages of the CMR remain connected to each other before and after acceptance of the notices by the United States Postal Service ("USPS") through return of the CMR to the CARTS Control Unit. Each computer-generated notice of determination listed on a CMR is pre-dated with its anticipated mailing date, and each bears its particular assigned certified control number at its top center area.

8. Statutory notices of determination that are ready to be mailed to taxpayers are placed in the Division's Mail Processing Center ("mailroom") "Outgoing Certified Mail" area, together with the CMR listing such notices. A mail room employee operates a machine which places each statutory notice in an envelope, weighs and seals each envelope and affixes postage and fee amounts thereon. A mailroom clerk then reviews the first and last pieces of mail as listed on the CMR and verifies the names and certified mail numbers thereon against the information contained on the CMR. The clerk then performs a random review of 30 or fewer pieces of certified mail listed on the CMR by checking the envelopes against the information from the CMR. Thereafter, a mailroom employee delivers the stamped envelopes and the associated CMR to one of the various branches of the USPS in Albany, New York, where a postal employee accepts the envelopes and the CMR into the custody of the Postal Service and indicates such acceptance by affixing a dated postmark and/or his or her signature or initials to the CMR. The Division has also specifically requested that the USPS indicate the specific total number of

pieces of mail received by either writing the number on the CMR or by circling such preprinted number on the CMR.

9. In the ordinary course of business a mailroom employee picks up the CMR from the post office on the following day and returns it to the originating office (CARTS Control) within the Division.

10. There are two CMRs relevant to this case. The first, pertaining to the April 27 notices, is a 14-page computer-generated document entitled "Certified Record For Non-Presort Mail." Page one of this CMR lists an initial (printing) date of April 17, 2000, which has been manually changed to April 27, 2000. This CMR lists consecutive certified control numbers P 911 205 479 through P 911 205 632, inclusive. Each such certified control number is assigned to an item of mail listed on the 14 pages of the CMR. Specifically, corresponding to each listed certified control number is a notice number, the name and address of the addressee, and postage and fee amounts. This CMR lists 11 items of mail on each of its pages except page 7, on which one of the entries (certified number P 211 205 546) has been crossed out, thus leaving 10 items on page 7 and resulting in a total of 153 items of mail, corresponding to the 153 certified control numbers remaining listed on the CMR. The crossed out item represents an article of mail which was removed or "pulled" from the group of items being mailed.

11. Information regarding three of the notices of determination at issue is contained on page four of the CMR described above. Specifically, corresponding to the consecutive certified control numbers P 911 205 512 through P 911 205 514, are the consecutive notice numbers L-017649104 through L-017649106, respectively, along with information listing petitioner's name and the address 1965 Broadway, 16A, New York, New York 10023-5928. This information,

including the address, is identical to that listed on the three subject notices of determination, and each notice of determination carries in its top center section the related certified control number.³

12. Each page of the foregoing CMR bears the postmark of the Colonie Center Branch of the USPS, dated April 27, 2000.

13. The last page of the CMR, page 14, also indicates the typewritten number “154” as the “Total Pieces [of mail] And Amounts [postage and fees] Listed” on the CMR. This figure has been manually crossed out and beneath it, under the listing “Total Pieces Received At Post Office,” the handwritten number “153” appears. In addition, the handwritten number “153” and the initials of a Postal Service employee appear at the lower left side of page 14 of the CMR.

14. The affixation of the Postal Service postmark, the crossed-out number “154,” the initials of the Postal Service employee, and the handwritten number “153,” as described above indicate, consistently with the deletion by cross out of one item of “pulled” mail as described, that 153 out of the 154 pieces of mail initially listed on the CMR were received into the custody of the USPS on April 27, 2000.

15. The second CMR relevant to this matter, and pertaining specifically to the May 11 notices, is a 31-page CMR. Page one of this CMR lists an initial (printing) date of May 2, 2000, which has been manually changed to May 11, 2000. This CMR lists consecutive certified control numbers P 911 006 947 through P 911 007 281, inclusive. Each such certified control number is assigned to an item of mail listed on the 31 pages of the CMR. Specifically, corresponding to each listed certified control number is a notice number, the name and address of the addressee, and postage and fee amounts. This CMR lists 11 items of mail on each of its pages except for

³ The notice numbers, names and addresses of taxpayers other than petitioner have been redacted from the CMR for purposes of compliance with statutory privacy requirements.

the last page, 31, which has 5 entries for a total of 335 items of mail listed on the CMR. There are no pulled items or any other deletions from the CMR.

16. Information regarding the May 11 notices is contained on pages five and six of the CMR described above. Specifically, corresponding to the consecutive certified control numbers P 911 007 000 through P 911 007 006 are the consecutive notice numbers L-017764222 through L-017764225 and L-017764230 through L-017764232, respectively, along with information listing petitioner's name and the address 1965 Broadway, 16A, New York, New York 10023-5928. This information, including the address, is identical to that listed on the seven notices of determination, and each notice of determination carries, in its top center section, the corresponding certified control number.⁴

17. Each page of the foregoing CMR bears the postmark of the Colonie Center Branch of the USPS, dated May 11, 2000.

18. The last page of the CMR, page 31, includes the typewritten number "335" as the "Total Pieces [of mail] And Amounts [postage and fees] Listed." However, unlike the earlier described CMR, this CMR does not contain any entry after the heading "Total Pieces Received At Post Office," nor is there any handwritten number, circled number, or initialing or signature by a Postal Service employee to indicate that all pieces of mail listed on the CMR were received into the custody of the USPS, or to indicate the specific number of pieces of mail actually received from the Division into the custody of the USPS on May 11, 2000.

19. The Division generally does not request, demand, or retain return receipts from certified or registered mail.

⁴ As with the earlier described CMR, the names and addresses of taxpayers other than petitioner have been redacted in order to comply with statutory privacy requirements.

20. The facts set forth above in Findings of Fact "7" through "9", "14", and "19" were established through affidavits made by Geraldine Mahon and James Baisley. Ms. Mahon is employed as the Principal Clerk in the Division's CARTS Control Unit. Ms. Mahon's duties include supervising the processing of notices of determination such as those at issue herein. Mr. Baisley is employed as a Principal Mail and Supply Clerk in the Division's Mail Processing Center. Mr. Baisley's duties include supervising mailroom staff in delivering outgoing mail to branch offices of the USPS.

21. The fact that the Postal Service employee wrote the total number of pieces received on the first described CMR to indicate that this was the number of pieces received was established through the affidavit of Mr. Baisley. Mr. Baisley's knowledge of this fact is based on his knowledge that the Division's Mail Processing Center specifically requested that Postal Service employees either circle the number of pieces received or indicate the total number of pieces received by manually writing the number of such pieces on the CMR. In contrast, the second described CMR contains no indication of such nature concerning the specific number of pieces of mail received. While Mr. Baisley's affidavits each note that the Division has specifically requested this confirmation of the specific number of pieces of mail actually received, his affidavit concerning the second CMR states only that the postal employee affixed a dated postmark indicating that 335 pieces of mail were received at the post office. Unlike his first affidavit, with its statement that the Division specifically requested the USPS to circle the number or write the number to indicate the pieces of mail actually received, his second affidavit does not provide any basis for his knowledge that the affixation of the postmark (as opposed to circling or writing the number) indicates that 335 pieces of mail were received.

22. In addition to the foregoing, the Division also submitted an affidavit made by one Terrence Atwater. Mr. Atwater has been the Director of the Division's Personal Income Tax Processing Bureau since 1992. His duties include overseeing analysis and testing of the Division's computer systems which process tax return information, store information derived therefrom, and generate printouts of such information. Included in the record, and identified by Mr. Atwater, is a printout of the information captured from petitioner's April 15, 2000 request for automatic extension of time to file his 1999 personal income tax return. The record also includes the first two pages from petitioner's 1998 New York State Resident Income Tax Return (Form IT-201). Petitioner's address on each of these documents is the same as it is on each of the notices in issue and on each CMR, to wit, 1965 Broadway, 16A, New York, New York 10023-5928.

23. The Division also served on petitioner's representative a Notice to Admit, seeking specifically two admissions, to wit, that petitioner received the ten notices of determination at issue in this proceeding, and that he received such notices within 30 days of their issuance. Petitioner's representative did not respond to the Notice to Admit and thus, pursuant to 20 NYCRR 3000.6(b)(2), is deemed to have admitted that petitioner received the ten notices within 30 days of their dates of issuance.

24. By a letter dated May 24, 2001, petitioner's representative advised that petitioner would not be responding to the subject motion for summary determination.

CONCLUSIONS OF LAW

A. Tax Law § 1138(a)(1) authorizes the Division of Taxation to issue a Notice of Determination to a taxpayer if a return required under Article 28 is not filed or if a return required under Article 28, when filed, is incorrect or insufficient. Section 1138(a)(1), in

conjunction with Tax Law § 1131(1) and § 1133(a), provides for the issuance of notices of determination to persons required to collect and remit sales and use taxes on behalf of various entities, as well as for the issuance of notices to the taxpayer entity itself. Pursuant to Tax Law § 1138(a)(1), a taxpayer may challenge such notices by filing a petition with the Division of Tax Appeals seeking revision of the determination within 90 days of the mailing of the notice. Alternatively, Tax Law § 170(3-a)(a) allows the taxpayer to file a request for a conciliation conference with the Division's BCMS following the issuance of a Notice of Determination, so long as the time to petition for a hearing in respect of such notice has not elapsed. Pursuant to these provisions, then, petitioner had 90 days from the issuance of the subject notices to file either a request for a conciliation conference with BCMS or a petition for a hearing with the Division of Tax Appeals.

B. Tax Law § 1147(a)(1) provides as follows:

Any notice authorized or required under the provisions of this article may be given by mailing the same to the person for whom it is intended in a postpaid envelope addressed to such person at the address given in the last return filed by him pursuant to the provisions of this article or in any application made by him or, if no return has been filed or application made, then to such address as may be obtainable. A notice of determination shall be mailed promptly by registered or certified mail. The mailing of such notice shall be presumptive evidence of the receipt of the same by the person to whom addressed. Any period of time which is determined according to the provisions of this article by the giving of notice shall commence to run from the date of mailing of such notice.

C. Where, as here, the Division claims a taxpayer's protest against a notice was not timely filed, the initial inquiry must focus on the issuance (i.e., mailing) of the notice. A notice is mailed when it is delivered to the custody of the USPS (*see, Matter of Air Flex Custom Furniture*, Tax Appeals Tribunal, November 25, 1992). Where a notice is found to have been properly mailed, "a presumption arises that the notice was delivered or offered for delivery to the

taxpayer in the normal course of the mail" (*see, Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). However, the "presumption of delivery" does not arise unless or until sufficient evidence of mailing has been produced, and the burden of demonstrating proper mailing rests with the Division (*id.*). The Division may meet this burden by producing evidence of its standard mailing procedure, corroborated by direct testimony or documentary evidence of the particular mailing in question (*see, Matter of Accardo*, Tax Appeals Tribunal, August 12, 1993). That is, the mailing evidence required is two-fold: first, there must be proof of a standard procedure used by the Division for the issuance of notices of determination by one with knowledge of the relevant procedures; and second, there must be proof that the standard procedure was followed in the particular instance (*see, Matter of Katz, supra; Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991).

D. In this case, the Division introduced adequate proof of its standard mailing procedures through the affidavits of Ms. Mahon and Mr. Baisley, two Division employees involved in and possessing knowledge of the process of generating and issuing (mailing) notices of determination (*see*, Finding of Fact "20").

E. The Division also presented sufficient documentary proof, i.e., the CMR, to establish that the April 27 notices were mailed to petitioner on April 27, 2000. Specifically, the relevant 14-page CMR lists sequentially numbered certified control numbers with corresponding names and addresses. While one entry on this document has been deleted, or pulled, such deletion is noted and explained in the affidavits. All 14 pages of the CMR bear a U.S. Postal Service postmark dated April 27, 2000, establishing such date as the date when the CMR was received at the post office. Additionally, as part of the standard procedure for the issuance of notices of determination, a postal employee wrote-in the number "153" as the "Total Pieces Received At

Post Office” figure and again wrote in such figure and initialed the same on page 14 of the CMR to specifically indicate receipt by the post office of 153 of the 154 pieces of mail listed on the CMR (*cf.*, *Matter of Roland*, Tax Appeals Tribunal, February 22, 1996 [where the mailing documents were found to be inadequate because there was no showing of the source of the affiant's knowledge as to the significance of the circling of the number of total pieces of mail listed]). This evidence is thus sufficient to establish that the Division mailed the first three notices of determination on the April 27, 2000 date as claimed. Petitioner, in turn, has not claimed that the address used on the notices was in any manner incorrect. Accordingly, such mailing was a proper mailing entitled to the presumption of delivery to the addressee in the regular course of the mail. Moreover, petitioner has been deemed to have admitted receipt of the April 27, 2000 notices within 30 days after the date of their issuance (i.e., mailing). In sum, the Division properly mailed the first three notices to petitioner on April 27, 2000.

F. As set forth in Conclusion of Law “A”, petitioner had 90 days from the date of issuance of the notices within which to file either a request for a conciliation conference or a petition for a hearing. The 90th day after April 27, 2000 was July 26, 2000. As noted, a document is mailed when it is delivered into the custody of the USPS, and the USPS postmark on such document (i.e., the mailing date) is considered the date of filing of such document (Tax Law § 1147[a][2]). In this case, the envelope containing the requests was mailed via the USPS, apparently using certified mail, and petitioner claims to have “postmark documentation” by which timely mailing could be established. However, there is no USPS postmark on the envelope to establish the date of mailing nor has petitioner submitted any other information such as a return receipt card from which the date of mailing (and presumably receipt) could be established. Further, neither the hand-affixed July 25, 2000 date on the requests pertaining to the April 27 notices (*see*, Finding of

Fact “3”) nor the July 25, 2000 machine-metered Pitney Bowes date on the envelope suffice to establish that the requests were mailed on such date. Such self- affixed dates are clearly and solely within the control of the mailer, as opposed to date stamps and postmarks affixed by an independent and disinterested third party such as the USPS or one of the designated delivery services.

G. With regard to the Pitney Bowes postmark of July 25, 2000, the regulations of the Tax Appeals Tribunal provide, at 20 NYCRR 3000.22(b), as follows:

(b) *Postmarks not made by the United States Postal Service.* (1) If the postmark on the envelope or wrapper containing the document is made by other than the United States Postal Service (*i.e.*, office metered mail):

(i) the postmark so made must bear a date which falls within the prescribed period or on or before the prescribed date for filing the document (including any extension of time granted for filing the document); and

(ii) the document must be received . . . not later than the time when an envelope or other appropriate wrapper which is properly addressed and mailed and sent by the same class of mail would ordinarily be received if it were postmarked at the same point of origin by the United States Postal Service within the prescribed period or on or before the prescribed date for filing (including any extension of time granted for filing the document).

(2) In case the document is received after the time when a document so mailed and so postmarked by the United States Postal Service would ordinarily be received, such document will be treated as having been received at the time when a document so mailed and so postmarked would ordinarily be received, if the person who is required to file the document establishes:

(i) that it was actually deposited in the mail before the last collection of the mail from the place of deposit which was postmarked (except for metered mail) by the United States Postal Service within the prescribed period or on or before the prescribed date for filing the document;

(ii) that the delay in receiving the document was due to a delay in the transmission of the mail; and

(iii) the cause of such delay.⁵

H. In this case, the only clearly established date for purposes of filing is the BCMS stamp indicating receipt of the envelope and the requests on August 21, 2000. Such date falls well after the July 26, 2000 date within which a protest had to have been filed. While the Pitney Bowes July 25, 2000 postmark does fall within the 90-day protest period, the ensuing August 21, 2000 date of receipt is well after the time when a document sent via the USPS would ordinarily have been received. Therefore, the conference requests cannot be accepted as timely filed protests under the regulations and case law pertaining to filing and postmarks not made by the USPS (20 NYCRR 3000.22[b]; *Matter of Almanzar*, Tax Appeals Tribunal, June 7, 2001; *Matter of Harrons Electric Service*, Tax Appeals Tribunal, February 19, 1988).⁶ Accordingly, with no timely protest against the April 27 notices, there is no jurisdiction to address the merits of the such notices and the petition with regard thereto is properly dismissed.

I. A different result occurs with regard to the May 11 notices, however, because the Division's proof of mailing falls short of establishing that such notices were in fact mailed on May 11, 2000. Specifically, the 31-page CMR for this mailing does not bear any entry made by the USPS to indicate the actual number of pieces of mail received at the post office. The CMR

⁵ Regulations of the Commissioner of Taxation at 20 NYCRR 4000.7(b)(1),(2) are consistent with and nearly identical to the regulations of the Tax Appeals Tribunal on this issue.

⁶ In this case, the mix of dates bears out the inherent unreliability of the machine metered postmark. The conciliation requests pertaining to the April 27 notices are hand dated July 25, 2000, the conciliation requests pertaining to the May 11 notices are hand dated August 7, 2000, the Pitney Bowes postmark on the *one* envelope in which *all* of the requests were mailed is dated July 25, 2000. In turn, the envelope and each of the requests bears a BCMS stamp indicating receipt by BCMS on August 21, 2000. With no other evidence to establish the date of mailing, such as a USPS or other independent postmark or certified mailing information, the only apparent conclusion is that petitioner's representative prepared, signed and dated the requests for the April 27 notices and affixed the Pitney Bowes postmark on July 25, 2000, but did not mail the requests on such date. Rather, it would appear that the requests for the May 11 notices were prepared, signed and dated August 7, 2000, were placed in the same envelope, and were mailed at some point thereafter between August 7, 2000 and the date of delivery to BCMS on August 21, 2000. In sum, it appears petitioner waited to prepare, sign and include the later dated requests in the same mailing as the earlier dated requests.

therefore fails to establish that the items addressed to petitioner were actually mailed to him on May 11, 2000 (*see, Matter of Cal-Al Burrito*, Tax Appeals Tribunal, July 30, 1998).

More specifically, the Baisley affidavit offered by the Division to show its standard mailing procedure states that “[a] USPS employee will then affix a postmark and/or his or her initials or signature to the certified mail record indicating receipt of the mail listed on the certified mail record and of the certified mail record itself. The USPS has further been requested by the Mail Processing Center to either circle the number of pieces received or indicate the total number of pieces received by writing the number of pieces on the mail record.” His affidavit goes on to state that “[a] review of [this CMR] confirms that a USPS employee affixed a postmark to each page of the certified mail record. Page 31 of this certified mail record indicates that a total of 335 pieces of mail listed were delivered to the USPS.” Page 31 of the CMR in fact contains no written number, or initials or circled number to indicate the number of pieces of mail received. Thus, it appears to be Mr. Baisley’s position that the affixation of the USPS stamp indicates that the Postal employee received all of the pieces of mail listed on the CMR. This assertion has not been accepted as fact herein because the record contains no evidence of the source of Mr. Baisley’s knowledge for this claim. That is, there is no assertion that the Division requested that the Postal employees affix a postmark as an indication or confirmation that each piece of mail listed was received (*compare, Matter of Roland, supra*). At best, the affixation of the postmark only establishes that the CMR was received by the Postal Service on May 11, 2000. However, it does not establish that all pieces of mail listed on the CMR were also received. Further, the statement in the Baisley affidavit that the affixation of the postmark indicates receipt of all 335 pieces of mail listed is inconsistent with numerous past statements of the Division’s mailing policy which required the receiving USPS employee to either circle the total number of

pieces received or to write the total number of pieces received in the space provided on the CMR in order to show that the document in question was actually mailed on the claimed date (*see, e.g., Matter of McNamara*, Tax Appeals Tribunal, March 9, 2000; *Matter of Golden Eagle Trading Corp.*, Tax Appeals Tribunal, February 10, 2000; *Matter of Kane*, Tax Appeals Tribunal, February 18, 1999).

J. Although the Division did not prove the actual date of mailing of the May 11 notices, petitioner did not contest the requested admission that he received such notices within 30 days of their issuance. As long as a statutory notice is received by a taxpayer in sufficient time to file a petition (*i.e.*, prior to the expiration of the period of limitations on issuance of a notice), the notice is valid (*see, Matter of Riehm v. Tax Appeals Tribunal*, 179 AD2d 970, 579 NYS2d 228, 229, *lv denied* 79 NY2d 759, 584 NYS2d 447), and the 90-day period to petition begins to run from the date of receipt (*see, Matter of Greene Valley Liquors*, Tax Appeals Tribunal, November 25, 1992).

K. Notwithstanding petitioner's deemed admission that the notices were received within 30 days of their issuance (an admission which carries with it the obvious fact that the notices were actually issued), it remains that the Division's proof still does not establish the actual date of issuance. Hence, it is not appropriate to measure the commencement of the petition filing period date as 30 days after the purported May 11th issuance date. It is noteworthy that the Division did not obtain or supply Postal Form 3811 which can, from USPS records, establish the date on which a particular piece of certified mail was delivered to the listed addressee. In the absence of an established issuance date, or of any particular and specific date of actual receipt of the notices by the petitioner, the only certainty is that petitioner apparently admits the notices were received on August 7, 2000 at the latest, since this is the date handwritten on the

conciliation conference requests pertaining to such notices. As explained earlier, the BCMS date stamp establishes that the requests were received at BCMS on August 21, 2000, and were deemed filed on such date. Therefore, such requests were timely as filed within 90 days after the date of actual receipt of the May 11 notices and petitioner is entitled to a hearing on the merits underlying such notices.⁷

L. In summary, the Division has established that the April 27 notices were issued as claimed on April 27, 2000, and petitioner has admitted that such notices were in fact received thereafter. Petitioner had 90 days from such April 27, 2000 issuance date, or until July 26, 2000, within which to file either a request for a conference or a petition challenging these notices. However, the first challenges to such notices were the conciliation requests deemed filed when received at BCMS on August 21, 2000. It is well established that a USPS postmark (as well as the date upon which a document was delivered to the custody of certain designated delivery services) will be deemed the date of filing of such document. However, self-controlled dates such as those affixed by a mailer using a machine metering device (such as Pitney Bowes) do not enjoy this rule, for the obvious reason that the machine-metered date is not necessarily the date on which the document is given over to the custody of the delivering party. Unlike the use of a third-party delivery service or the USPS, the “self-mailing” situation shows the inherent unreliability of machine-metered dates the affixation of which is within the control of the mailer who both affixes the date and chooses the actual date of mailing (i.e., the date when the piece of mail is delivered into the custody of the USPS). Hence, the date of filing is the August 21, 2000 date of receipt by BCMS, and such date falls more than 90 days after the date of issuance of the

⁷ Given that the BCMS indate stamp established that the requests were filed on August 21, 2000, any date of actual receipt of the notices falling on or after May 24, 2000 (i.e., within the 90-day span prior to August 21, 2000) would leave the requests timely filed.

April 27 notices. While claiming to have “postmark documentation” to establish that all conference requests were filed within 90 days after the issuance of the notices, petitioner has not submitted the same and chose not to respond to the instant motion. Hence, petitioner’s allegation of proof of timely filing remains simply an allegation not borne out as established by any such proof. The 90-day period for filing is absolute and there is no provision in the Tax Law for waiver or extension of such period (*see, Halperin v. Chu*, 138 AD 2d 915, 526 NYS2d 660, 661, 662, *lv denied and appeal dismissed*, 72 NY2d 938, 532 NYS2d 845; *Matter of Sak Smoke Shop, Tax Appeals Tribunal, January 6, 1989, Matter of Roland, supra.*). Accordingly, the conciliation requests pertaining to the April 27 notices were not timely filed, there is no jurisdiction to address the merits, and the petition must be dismissed with respect thereto.

With respect to the May 11 notices, the Division has not established the date of issuance thereof, or any date of actual receipt by petitioner earlier than August 7, 2000. Commencing the 90-day protest period from such August 7, 2000 date, as discussed above, leaves the conciliation requests received at BCMS and deemed filed on August 21, 2000 clearly timely, and petitioner is entitled to proceed to a hearing on the merits with respect to such notices.

M. The Division’s motion for summary determination is granted with respect to the first three notices of determination (those dated April 27, 2000) and the petition of Eric S. Brown is hereby dismissed with regard thereto. The Division’s motion for summary determination with respect to the remaining seven notices of determination (those dated May 11, 2000) is denied and a hearing concerning the merits of such seven notices will proceed as scheduled on August 21, 2001.

DATED: Troy, New York
August 9, 2001

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE